

The issue is whether the Office properly terminated appellant's compensation effective July 18, 2008 on the grounds that she refused an offer of suitable work.

## **FACTUAL HISTORY**

The Office accepted that on September 20, 1992 appellant, then a 49-year-old clerk, sustained aggravation of lumbar disc displacement when she lifted an eight-pound mail tray and turned to place it on a ledge.<sup>1</sup> It paid her compensation for periods of disability.<sup>2</sup>

On November 11, 1992 Dr. Young H. Kim, an attending Board-certified neurosurgeon, performed laminectomy and discectomy surgery at L3, L4 and L5, which was authorized by the Office. On January 28, 1994 appellant returned to light-duty work for the employment establishment. On February 4, 1994 she stopped work. On March 24, 1994 appellant underwent authorized laminectomy, discectomy and disc replacement surgery at L4.

Appellant received treatment from several physicians over the years and in 2000 she came under the care of Dr. John P. Conomy, a Board-certified neurologist. On March 30, 2006 the Office asked Dr. Conomy to address whether appellant had continuing residuals of her employment injury. Dr. Conomy responded that appellant was totally and permanently disabled due to her employment injury.

On September 7, 2006 Dr. Karl V. Metz, a Board-certified orthopedic surgeon and an Office referral physician, discussed appellant's factual and medical history and the findings on examination and diagnostic testing. He noted that appellant showed tenderness to palpation at L5 and stated that there was marked guarding during the lumbar spine examination. The sensory examination was normal and her legs had 5/5 strength. Dr. Metz concluded that, although residuals of appellant's employment injury prevented her from performing her regular work, she was capable of working four hours per day in sedentary work with occasional lifting of up to 10 pounds and no repetitive, bending, kneeling, squatting, lifting, pushing or pulling. The work would allow her to change positions frequently.

On November 1, 2006 Dr. Conomy stated that appellant suffered pain, weakness, sensory loss and reflex disturbances in her legs. He indicated that she was unable to work because of her neurologic condition with impairment from multiple nerve roots and chronic pain. Dr. Conomy indicated that appellant's nerve injuries and the affects of medication, which caused drowsiness, prevented her from being gainfully employed.

On January 30, 2007 the employing establishment offered appellant a position as a modified mail processing clerk for four hours per day. The position involved casing mail and looking for improperly sorted letters. The work could be performed seated and appellant would not be required to lift items weighing more than about one ounce. On February 7, 2007 appellant declined the offered position contending that her physical condition prevented her from performing the duties of the position. On March 1, 2007 she elected civil service retirement benefits with the Office of Personnel Management (OPM) effective May 1, 2007.

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<sup>1</sup> The clerk position required appellant to lift up to 80 pounds.

<sup>2</sup> Appellant sustained a work-related L5 disc herniation on November 26, 1976, which resulted in a laminectomy at this level being performed in 1977. In 1979 she underwent disc replacement surgery. Appellant also had nonwork-related degenerative disc disease of the cervical spine.

The Office determined that there was a conflict in the medical opinion between Dr. Conomy and Dr. Metz regarding appellant's ability to work. In order to resolve the conflict, the Office referred her, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. James Shaer, a Board-certified orthopedic surgeon, for an impartial medical examination.<sup>3</sup>

On March 26, 2007 Dr. Shaer described appellant's factual and medical history and detailed findings on examination and diagnostic testing. He found that examination revealed that appellant had normal sensation and 5/5 strength in her legs. Appellant exhibited some limitation of back motion but there were no paravertebral muscle spasms upon palpation of the lumbar spine. She expressed discomfort on straight leg raising and hip rotation. Dr. Shaer indicated that he had reviewed the duties of the modified mail processing clerk position and concluded that the job was appropriate for appellant. He noted that her physical examination was highly subjective with respect to pain and that she had signs of symptom exaggeration. Dr. Shaer indicated that stimuli which would not be considered noxious were considered very debilitating to appellant and elicited expressions of marked discomfort. He stated that he was familiar with the medications taken by appellant, including Neurontin, Norco, Mobic, Halcion and Prozac. Dr. Shaer noted that Halcion and Norco could cause marked drowsiness but stated that she would be able to perform the modified mail processing position because the duties of the job would not require much in the way of critical thought.

In a May 17, 2007 letter, the Office advised appellant of its determination that the modified mail processing clerk position offered by the employing establishment was suitable. It informed her that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter. Appellant did not respond to this letter within the allotted time.

In a June 18, 2007 letter, the Office advised appellant that she did not provide good cause for not accepting the modified mail processing clerk position offered by the employing establishment. It informed her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. In June 20 and 25, 2007 letters, appellant advised the Office that she was opting to take a disability retirement. She indicated that Dr. Shaer suggested that she stop taking certain medications but asserted that she would experience increased pain without taking them.<sup>4</sup>

In a July 18, 2007 decision, the Office terminated appellant's compensation effective July 18, 2007 on the grounds that she refused an offer of suitable work. It found that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized opinion of Dr. Shaer.

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<sup>3</sup> The record contains a February 21, 2007 report of Dr. John Collis, an attending Board-certified neurosurgeon, but the report does not contain any opinion on appellant's ability to work.

<sup>4</sup> Appellant submitted a June 5, 2007 report in which Dr. Kim described an epidural injection she received in her lumbar spine.

Appellant requested a hearing before an Office hearing representative. At the November 14, 2007 hearing, she testified that she was on disability retirement and was not physically capable of working. Appellant's attorney asserted that the employing establishment had indicated that they were reevaluating everyone on limited-duty work and implied that the position offered to appellant would probably be eliminated. He asserted that the employing establishment had not made a "good faith offer" to appellant. Counsel argued that the employing establishment could not accommodate the claimant in 1995. He asserted that the physical limitations of the offered position were not specific enough to clarify what appellant would be physically required to do and claimed that the position could require lifting, bending and pushing which were not specified in the job description. Counsel argued that the task of casing could not be performed while being seated in a chair.<sup>5</sup>

In a January 24, 2008 decision, the Office hearing representative affirmed the July 18, 2007 decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>6</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>7</sup> An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.<sup>8</sup>

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>9</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

### **ANALYSIS**

The Office accepted that on September 20, 1992 appellant sustained aggravation of lumbar disc displacement when she lifted a mail tray and turned to place it on a ledge. On

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<sup>5</sup> Appellant resubmitted copies of Dr. Collis' February 21, 2007 report and Dr. Kim's June 5, 2007 report. She also submitted a January 10, 2008 report in which another attending physician described the application of lumbosacral blocks.

<sup>6</sup> 5 U.S.C. § 8106(c)(2).

<sup>7</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>8</sup> 20 C.F.R. § 10.124; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

November 11, 1992 appellant underwent laminectomy and discectomy surgery at L3, L4 and L5, which was authorized by the Office. On March 24, 1994 she underwent authorized laminectomy, discectomy and disc replacement surgery at L4.

On January 30, 2007 the employing establishment offered appellant a position as a modified mail processing clerk for four hours per day. The position involved casing mail and looking for improperly sorted letters. The work could be performed seated and appellant would not be required to lift items weighing more than one ounce. The Office determined that the offered position was suitable based on the opinion of Dr. Shaer, a Board-certified orthopedic, who served as an impartial medical examination.

The evidence of record shows that appellant is capable of performing the modified mail processing clerk position offered by the employing establishment in January 2007 and determined to be suitable by the Office in May 2007. In determining that she is physically capable of performing the offered position, the Office properly relied on the opinion of Dr. Shaer. It found that a conflict in the medical opinion arose between Dr. Conomy, an attending a Board-certified neurologist, and Dr. Metz, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding her capacity for work.<sup>11</sup> In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Shaer for an impartial medical examination and an opinion on the matter.<sup>12</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Shaer, the impartial medical specialist selected to resolve the conflict in the medical opinion.<sup>13</sup> The March 26, 2007 report of Dr. Shaer establishes that appellant could perform the modified mail processing clerk position.

On March 26, 2007 Dr. Shaer described appellant's factual and medical history and detailed her findings on examination and diagnostic testing. He indicated that examination revealed that appellant had normal sensation and 5/5 strength in her legs. Appellant exhibited some limitation of back motion but there were no paravertebral muscle spasms upon palpation of the lumbar spine. She expressed discomfort on straight leg raising and hip rotation. Dr. Shaer indicated that he had reviewed the duties of the modified mail processing clerk position and concluded that the job was appropriate for appellant.

The Board has carefully reviewed the opinion of Dr. Shaer and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Shaer's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts,

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<sup>11</sup> In a September 7, 2006 report, Dr. Metz concluded that, although residuals of appellant's employment injury prevented her from performing her regular work, she was capable of working four hours per day in sedentary work with occasional lifting of up to 10 pounds and no repetitive, bending, kneeling, squatting, lifting, pushing or pulling. In contrast, Dr. Conomy indicated in March 30 and November 1, 2006 reports that appellant's accepted employment injury rendered her totally disabled from work.

<sup>12</sup> See *supra* note 9 and accompanying text.

<sup>13</sup> See *supra* note 10 and accompanying text.

provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>14</sup> He provided medical rationale for his opinion by explaining that there were limited objective findings on examination given that appellant had a highly subjective physical examination with respect to pain. Dr. Shaer posited that appellant had signs of symptom exaggeration and indicated that stimuli which would not be considered noxious were considered very debilitating to her and elicited expressions of marked discomfort. He explained that appellant's use of medications would not prevent her from performing the offered position. Dr. Shaer noted that Halcion and Norco could cause marked drowsiness but stated that appellant would be able to perform the modified mail processing position because the duties of the job would not require much in the way of critical thought.

The Board finds that the Office has established that the modified mail processing clerk position offered by the employing establishment is suitable. As noted, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her refusal of the modified mail processing clerk position and notes that it is not sufficient to justify her refusal of the position.

Appellant, through her attorney, argued that the modified mail processing clerk position did not represent a "good faith offer" because it was felt that the employing establishment would have eliminated the position at some point. She also believed that the job description of the offered position did not describe all the required job duties. However, appellant did not submit evidence supporting these contentions.<sup>15</sup> She submitted several reports of attending physicians, including a February 21, 2007 report of Dr. Collis, an attending Board-certified neurosurgeon and a June 5, 2007 report of Dr. Kim, another attending Board-certified neurosurgeon. The reports were not relevant to the main issue of the present case because they did not contain any opinion on appellant's ability to work.

For these reasons, the Office properly terminated appellant compensation effective July 18, 2008 on the grounds that she refused an offer of suitable work.<sup>16</sup>

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective July 18, 2008 on the grounds that she refused an offer of suitable work.

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<sup>14</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>15</sup> Appellant asserted that Dr. Shaer suggested that she stop taking certain medications but indicated that she would have increased pain without taking them. Dr. Shaer actually noted that appellant could take all her usual medications and still would be able to perform the offered position.

<sup>16</sup> The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to accept the modified mail processing clerk position after informing her that her reasons for initially refusing the position were not valid; see generally *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 24, 2008 and July 18, 2007 decisions are affirmed.

Issued: November 10, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board